IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-544

STATE OF LOUISIANA IN THE INTEREST OF RUSSELL GIANGROSSO, LONNIE GROS, AND SCOTT HOOD

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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Franklin Press, Inc. — Baton Rouge, La.

INDEX

CASE CITATIONS

IN THE

SUPREME COURT OF THE UNITED STATES

No.

STATE OF LOUISIANA
IN THE INTEREST OF
RUSSELL GIANGROSSO, LONNIE GROS,
AND SCOTT HOOD

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF LOUISIANA

The petition of Russell Giangrosso, Lonnie Gros, and Scott Hood through undersigned counsel, with respect represents:

I.

There is to date no reference to the reports of opinions delivered by any of the courts in the State of Louisiana relative to the application for Jury Trial, but attached hereto is a copy of the judgment of the First Circuit Court of Appeal for the State of Louisiana bearing First Circuit Number

11,979 rendered May 3, 1978, permitting petitioners the rights to take depositions and having the victims examined but denying the request for Jury Trial. The opinion of the First Circuit Court of Appeal relative to discovery issues is reported at 361 So.2d 259. Also attached hereto is the order of the Supreme Court of the State of Louisiana dated June 30, 1978, denying petitioners the application for writs to review the right to jury trial in Supreme Court of Louisiana proceedings numbered 62,393.

II.

This Honorable Court has jurisdiction of this matter as an appeal from a court of last resort for the State of Louisiana namely the Supreme Court of Louisiana and from that judgment of the court rendered and filed June 30, 1978, in proceedings numbered 62,393.

This Honorable Court has jurisdiction to review the judgment of the Supreme Court of the State of Louisiana by virtue of 23 U.S.C.A. 1257 (3).

III.

The questions presented for review by this Honorable Court are as follows:

1. Is Louisiana Revised Statute 13:1579 uncorstitutional as violative of the rights guaranteed by the 6th Amendment to the Constitution of the United States of America as made applicable to the States by the 14th Amendment due process clause.

2. Does the procedure of Louisiana as outlined in L.S.A. R.S. 13:1579 in denying jury trials to juveniles meet the tests of fundamental fairness prescribed by the

decision of the United States Supreme Court in McKeiver & Terry v. State of Pennsylvania, 91 Sup.Ct. 1976, 403 U.S. 528 (1971).

IV.

The particular constitutional provisions and cases involved are as follows:

a. Constitution of the United States, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

b. Constitution of the United States, Amendment XIV: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

c. McKeiver & Terry v. State of Pennsylvania, 91 Sup. Ct. 1976, 403 U.S. 528 (1971)

V.

STATEMENT OF CASE

On October 8, 1977, the three minor defendants were arrested at about 9:00-9:30 p.m. for allegedly raping two girls and attempting to rape one additional girl. The three defendants were immediately brought to the Ascension Parish Jail where they were questioned by a sheriff's deputy and/or juvenile officer without the benefit of consultation with their

parents or an attorney. After the interrogation, the three minors were held in the jail without bond being set.

On October 9, 1977, at the instance of counsel for defendants Giangrosso and Gros, at about 12:00 noon, bond was set by the Honorable A. J. Kling, Jr.. Judge of the Parish Court at Five Thousand and no/100 ($5,000.00) Dollars per child. At about 1:00 p.m. defendants Giangrosso and Gros were released to the custody of their parents by virtue of being bonded out of jail. Subsequent to that time, during the same afternoon, defendant Hood was released to the custody of his parents without bond.

At about 5:15 p.m., October 9, 1977, defendant Giangrosso was picked up by the sheriff's office and reincarcerated for the same alleged offense in the Ascension Parish Jail with a new Fifty Thousand and no/100 ($50,000.00) Dollars bond. Later during the afternoon or early evening, the remaining defendants were also picked up and reincarcerated in the jail on Fifty Thousand and no/100 ($50,000.00) Dollar bonds each.

On October 12, 1977, petitions were filed with the Clerk of Court against defendants. A hearing was had to formally charge defendants Giangrosso and Gros on October 13, 1977, at which time defendants entered not guilty pleas with counsel requesting a reduction of bond. On October 17, 1977, defendant Scott Hood was formally charged in court, pled not guilty and requested a reduction in bond. The judge advised that he would take the request under advisement. On October 21, 1977, the judge reduced the bond to Twenty-Five Thousand and no/100 ($25,000.00) Dollars per defendant, which was posted on said date and the defendants released.

On or about November 1, 1977, attorneys for the defendants presented a Motion for Continuance of the last day for filing motions which had previously been set for November 7, 1977, and for continuance of the trial date, which had been set for November 16 and 17, 1977. This motion was also taken under advisement by the judge. Subsequently, the judge advised counsel that they would have until December 12, 1977, to file pre-trial motions and/or pleadings and that the trial date was reset for December 15 and 16, 1977.

On December 6, 1977, counsel filed with the Clerk of Court a notice of taking the depositions and requested subpoenas for the taking of the depositions of four individuals on December 9, 1977. On December 7, 1977, movers appeared in court for the purposes of and did file: (1) Motion for Transfer; (2) Motion for Preliminary Hearing; (3) Motion for Discovery; (4) Motion to Suppress Statements; (5) Motion for Trial by Jury. On December 7, 1977, the Honorable Aubert D. Talbot, District Attorney, advised counsel for defendants of his unavailability for depositions on December 9, 1977, and requested a continuance of the same until later date, at which time he would advise attorneys for the defendants whether or not he would oppose the taking of the depositions or participate in same.

On December 13, 1977, attorneys for defendants had a conference with the Honorable A. J. Kling, Jr., Judge for the purposes of ascertaining the status of the motions' date and trial date. The court advised that the motions would be heard on December 15, 1977, and trial at some time thereafter.

On December 15, 1977, the motions were heard by the court. In addition, by consent of the District Attorney, counsel

for defendants and the court, the judge also ruled on the right of defendants to take the depositions of the three complaining witnesses and the father of two of the complaining witnesses. At that time, the Honorable A. J. Kling, Jr., denied the rights of defendants to take depositions, denied the motions for jury trial, discovery and transfer. No decisions were rendered on the motions for preliminary hearing, to suppress statements and on the request of defendants for answers to various interrogatories which had also been previously filed. The District Attorney advised the court that he desired additional time within which to decide whether or not he would oppose any one or all of these additional requests.

At the time of denial of the request, attorneys for the defendants notified the court of their intention to take writs to the rulings of the court and asked that the court grant such additional time to said attorneys. The court advised that it would not stay any proceedings and that it was not necessary to grant additional time inasmuch as the attorneys for defendants could file for the writs as they saw fit.

As a result of the application for Writs of Certiorari and Mandamus being filed with the First Circuit Court of Appeal judgment was rendered by the First Circuit Court of Appeal ordering that an Alternative Writ of Mandamus issue commanding the Honorable A. J. Kling, Judge of the Parish Court for the Parish of Ascension to permit the taking of the depositions of the alleged victims and witnesses and granting to defendants the right to have the alleged victims examined by a physician.

The Court of Appeal denied the Applications for review of the denial of the trial court of defendants' motion for jury

trial and transfer of the trial matter to the district court, juvenile division.

The Supreme Court for the State of Louisiana denied the applications for review of the First Circuit Court of Appeals denial of defendants' motion for jury trial.

STATE OF PROCEEDINGS

In Parish Court for the Parish of Ascension, State of Louisiana there is presently pending the motions filed by defendant and taken under advisement by the trial judge, the Honorable A. J. Kling, and to date not ruled upon:

1. Interrogatories propounded to the State of Louisiana

2. Motion for preliminary hearing

3. Motion to suppress statements.

There are no motions, appeals or writs pending in the First Circuit Court of Appeal, for the State of Louisiana by the defendants or the State of Louisiana.

On August 11th the Clerk of the Supreme Court of Louisiana notified all parties that the Supreme Court had stayed further proceedings until further order of the court. The Supreme Court of Louisiana granted writs and has before it **only the question of the rights of defendants to take depositions and to have the alleged victims examined.** Oral arguments have not been set.

The ruling of the trial court on the motion for trial by

jury is reported as follows at page 75 of the trial court transcript:

JUDGE:

> "I believe this is one of the area where the law in reference to juveniles is clear. R.S. 13:1579 provides that all cases of children shall be heard separately from the trial of cases against adults and shal be tried without a jury. This Court is not aware of any Louisiana jurisprudence which has declared that statute unconstitutional.
>
> "The Court would further, of course, like to point out that I believe that this is something that the Legislature clearly intended in view of the fact that the jurisdictional statute, that is 13:1570, clearly sets out that for certain enumerated offenses, if the juvenile is charged with a certain enumerated offense, that these cases shall be tried by the district court, and in those cases the juvenile would have the benefit of a jury trial because he would be tried by the district court as an adult. The Court believes that the Legislature clearly intended to make an exception in cases which are less serious than the crimes which are enumerated and clearly intended that a juvenile not be tried by a jury. Whether or not the Supreme Court or the Federal courts are going to declare that unconstitutional remains to be seen. But for now this Court believes that that is the law of this State. Accordingly the Motion for a Jury Trial is hereby dismissed."

Counsel for defendants Giangrosso, Gros and Hood, timely objected to the ruling of the trial judge at page 76 of the trial court record.

BY MR. VEGA:

> "Again, to which ruling of the Court we respectfully except and ask that the entire record of the motion, the objections, the transcript of the comments of myself, Mr. Robert, Mr. Talbot and the Court be made a part thereof."

BY MR. ROBERT:

> "I'd also like to object, may it please the Court, Your Honor. In connection with that objection I'd like the record to note that it's our contention that the provision of the Louisiana Legislature is unconstitutional for the reasons which we have set forth. We would also like to state that it's our contention that if this matter or if the juveniles in this matter had been handled as adults would be handled or are handled that they are entitled to a trial by jury, and we would request of the Court leave in order to take writs."

VI.

ARGUMENT

The procedure followed by the State of Louisiana in juvenile cases in denying jury trial as provided in L.S.A. R.S. 13:1579 is unconstitutional and in violation of the 6th Amendment to the Constitution of the United States as well as the 14th Amendment. Juveniles are denied due process of law and specifically a trial by jury and in exchange are given a special procedure supposedly designed to aid the juvenile and relieve the adversary atmosphere and provide for due process; however, in Louisiana the juveniles are actually treated the same, or possibly worse, than adult defendants. The special juvenile procedure fails to meet the constitutional test as specified in the decision of *In Re Gault*, 387 U.S. 1,87 Sup.Ct. 1428,

18 L.Ed. 2d 527 and *Duncan v. Louisiana*, 391 U.S. 145, 88 Sup. Ct. 1444 20 Lawyers Edition 2d 491. The factual situation herein concerning the arrest of these juveniles exemplifies the lack of consistency and total denial of due process observed by the Louisiana Courts. First the juvenile defenders herein were arrested by the Ascension Parish Sheriff's department and released the following day on a bond of $5,000. The same day the bond was arbitrarily, capriciously and for absolutely no reason whatsoever, raised to the sum of $50,000 and the juveniles were re-arrested and placed in the Ascension Parish Jail. Second, the juveniles were confined in an adult penal institution which has no section or cells specifically designated to house juveniles. While in the Ascension Parish Jail the juveniles were treated in all respects as adult offenders. Third, the juveniles were questioned by the Ascension Parish Sheriff's Department without their parents being notified or given an opportunity to be present and without affording them the opportunity of having counsel present during the questioning.

The juveniles were later, following a motion to reduce bond, released on a $25,000 bond, an amount far in excess of that customarily set for juveniles or adults charged with similar crimes who have life long roots in the community.

A preliminary hearing was ordered by Judge Penrose C. St. Amant of the 23rd Judicial District Court, however, before this hearing could be held the charges were filed in the Parish Court for the Parish of Ascension without any reason whatsoever being given. The Parish Court for the Parish of Ascension is a court of concurrent jurisdiction in juvenile matters, but has no felony jurisdiction.

The Parish Court came into existence as a result of legislation passed in 1977, and officially began hearing cases January 1, 1978. It is submitted that the procedure in juvenile matters in Louisiana is arbitrary, capricious and affords the State of Louisiana the right to shop and choose a court which may or may not have the expertise in handling juvenile matters based upon felony charges.

The juveniles filed certain motions, including a motion to have the matter set for trial by jury and motions for discovery. These motions were denied and the juveniles appealed their case to the First Circuit Court of Appeals of the State of Louisiana. The Parish Court was ordered to allow the discovery as requested by the juveniles. However, before depositions could be arranged the state obtained a Stay Order from the Supreme Court of the State of Louisiana. Thus the State was able to prevent the juveniles from obtaining the discovery necessary to provide any type of defense whatsoever in this matter. It is submitted that the State of Louisiana has allowed these juveniles absolutely no discovery thereby denying them and their counsel the ability to prepare an adequate and reasonable defense, a clear denial of due process and fundamental fairness as guaranteed by the 6th and 14th Amendments to the U.S. Constitution. The leading case decided by the Supreme Court of the United States as regards jury trials in juvenile cases is the case of *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 Sup. Ct. 1976 (1971). In that case the court concluded that if a state provides a special procedure for juvenile cases and this procedure meets the test of fundamental fairness and affords the juveniles due process of law then a trial by jury is not required.

In deciding the case of *McKeiver v. Pennsylvania, Supra.*,

the Supreme Court considered a series of cases expanding juvenile constitutional rights. These cases included *Haley v. Ohio*, 332 U.S. 596 68 Sup. Ct. 302, 92 L.Ed. 224. A decision in which Mr. Justice Douglas, joined by three other justices, said "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." *Gallgos v. Colorado*, 37 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d, 325; *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966); *In Re Gault*, 387 U.S. 1, 87 S.Ct. 1448, 18 L.Ed.2d 527 (1967), in which Mr. Justice Fortas, in writing for the court, reviewed the cases just cited and observed, "Accordingly, while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."; *DeBacker v. Brainard*, 396 U.S. 28, 90 S.Ct. 163, 24 L.Ed.2d 148, (1969) in which Mr. Justice Black and Mr. Justice Douglas in separate opinions stated that a juvenile is entitled to a jury trial at the adjudication stage. Mr. Justice Black described this as "a right which is surely one of the fundamental aspects of criminal justice in the English speaking world" and Mr. Justice Douglas described it as a right required by the Sixth and Fourteenth Amendments "Where the delinquency charge is an offense that if the person were an adult would be a crime triable by jury"; in the case of *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) the court held that "The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime of which he is charged."

The decision of *McKeiver v. Pennsylvania, Supra*, holds, in short that the applicable due process standard in juvenile

proceedings as developed by *In Re Gault* and *Winship* is fundamental fairness. Therefore, it is argued that when juveniles are treated as adult criminal offenders and the juvenile system does not use the available diagnostic and rehabilitative services intended in the juvenile court system, but rather seeks to incarcerate juveniles on unreasonably high and unattainable bonds, in prison cells at an adult penal institution and where the juveniles are questioned without the presence of their parents or counsel, and where motions for discovery as provided for by the rules of civil procedure are routinely denied by the court, it can only be concluded that the juveniles, who are being treated as adults, should be entitled to the adult rights of a trial by jury in order to protect their constitutional rights and afford them the fundamental fairness required by the decision of *McKeiver v. Pennsylvania, Supra.*

Further, in this case the trial judge has ordered a report to be made before the hearing of this matter by the Louisiana State Dept. of Probation and Parole. Mr. Justice Black in his descent to *McKeiver v. Pennsylvania, Supra*, states, "Trial by jury will provide the child with a safeguard against being prejudiced. The jury clearly will have no business in learning of the social report or any of the other extraneous matter unless properly introduced under the rules of evidence. Due process demands that the trier of facts should not be acquainted with any of the facts of the case or have knowledge of any of the circumstances whether through officials or his own department or records in his possession. If the accused believes that the judge has read an account of the facts submitted by the police or any other report prior to the adjudicatory hearing and that this may prove prejudicial, he can demand a jury and insure against such knowledge on the part of the trier of the facts." In this case, the juveniles demand such a trial by jury and

are in fear that the judge has accumulated facts and reports on this matter prior to the hearing to their prejudice.

Further, at the hearing on the motion for trial by jury, the trial judge denied any arguments by counsel concerning the treatment of the juveniles as adult offenders, restricting all arguments to cases and law. To this ruling counsel objected and reserved notes of evidence. Counsel further asked to submit their arguments in the record by means of a proffer of evidence which was denied by the trial judge, leaving the record without the necessary proffer to prove error in the rulings of the trial court.

Further, counsel for Scott Hood, an indigent, was denied a copy of the transcript of the hearing on this motion to be used in preparing these writs, all in violation of the said juvenile's constitutional rights.

Even the Louisiana Supreme Court in the case of *State in the Interest of Dino*, 359 So.2d 586, decided May 8, 1978, presently before this Honorable Court for review, recognized the severity of the consequences of juvenile adjudications. The court stated at page 595:

> "The consequences which can result from a juvenile adjudication are much more severe than the legal and social sanctions which flow from many offences committed by adults who are entitled to a public trial."

In the *Dino* case the Supreme Court further recognized that the consequences of juvenile proceedings may be the same as in an adult criminal trial, when, at page 595, it stated:

> "A judicial proceeding which may result in the removal

> of a child from the custody of his parents and in his confinement until the age of twenty-one years is not essentially different from a criminal trial . . . Indeed, it is even possible that ultimately it could result in the juvenile being incarcerated in a penal institution with adult offenders."

Finally, the court in the *Dino* case at page 596 stated:

> "Because the consequences which confront a child who is alleged to have committed a criminal offense are essentially the same as those faced by adult criminal defendants, the protections which may be afforded by a public trial in juvenile proceedings corresponding to criminal cases are of great importance."

It is obvious that the Supreme Court of the State of Louisiana recognizes that juvenile proceedings in Louisiana are essentially criminal in nature and can result in punishment as as adult. It is submitted that while the Louisiana Supreme Court in the *Dino* case was addressing itself to the lesser right to a public trial, it should have taken this same position relative to the greater and more fundamental right to a jury trial as specifically guaranteed by the Sixth Amendment to the Constitution of the United States and made applicable to the States by the Fourteenth Amendment.

It is further submitted that the procedures utilized in Louisiana in juvenile matters fail to meet the Constitutional requirements as noted above and the fundamental fairness test as outlined in the *Gault* and *McKeiver* cases and that therefore this Honorable Court should declare Louisiana Revised Statutes 13:1579 unconstitutional insofar as it denies a juvenile the right to a jury trial.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Louisiana.

Respectfully submitted,

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ALAN J. ROBERT
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Gonzales, Louisiana 70737

APPENDIX NO. 1

Defendants' Motion in Trial Court

STATE OF LOUISIANA IN THE INTEREST OF RUSSELL GIANGROSSO, LONNIE GROS, AND SCOTT HOOD	NUMBERS: 861, 886 & 887 ASCENSION PARISH COURT JUVENILE DIVISION STATE OF LOUISIANA
FILED: _____	_____ CLERK OF COURT

MOTION FOR TRIAL BY JURY

On motion of Russell Giangrosso, Lonnie Gros, and Scott Hood, juveniles herein, through their undersigned counsel, move this court for a trial by jury for the following reasons, to-wit:

1.

The Sixth Amendment to the Constitution of the United States, states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . . ."

2.

The United States Supreme Court in the case of *Duncan v. Louisiana*, 391 U. S. 145, 20 L. Ed. 2d., 491, 885 Ct., 1444, held that the Sixth Amendment right to a jury trial applies in State Courts where the possible penalty upon conviction is confinement for more than six (6) months.

3.

Article 1, Section 17 of the Constitution of the State of

Louisiana, adopted April 20, 1974, and effective midnight, December 31, 1974, states, "A case in which the punishment may be confinement at hard labor, or confinement without hard labor for more than six (6) months **shall** be tried before a jury of six (6) persons, five (5) of whom must concur to render a verdict . . . ."

4.

The United States Supreme Court in the decision, RE Winship, (1970), 397 U.S. 358, 25 L.Ed., 2d, 368, 905 Ct. 1068, has stated that a child has adult rights to Fourteenth Amendment protections, recognizing juvenile proceedings to be more than a civil hearing.

5.

The case of *Nieves v. United States*, (1968), DC NY, 280 F. Supp., 994, states that children have the right to a trial by jury in a proceeding for a violation of the criminal law, if the result of an adjudication might be commitment to an institution. This case was held to be in the nature of a criminal proceeding for the purposes of the Sixth Amendment right to a jury trial, and the Court supported the proposition that a statute which grants the child a choice of being tried as an adult by a jury, or as a youth without a jury, places an unconstitutional burden on the youth.

WHEREFORE, Russell Giangrosso, Lonnie Gros and Scott Hood, juveniles, pray that this Motion for a Jury Trial be maintained and this matter be set for hearing before a jury of six (6) persons, as prescribed by the Louisiana Constitution of 1974.

By Attorneys,

s/ Alan J. Robert
s/ Benjamin C. Vega, Jr.

APPENDIX NO. 2

Ruling of Trial Judge A. J. Kling

BY THE COURT:

I believe this is one of the area where the law in reference to juveniles is clear. R.S. 13:1579 provides that all cases of children shall be heard separately from the trial of cases against adults and shall be tried without a jury. This Court is not aware of any Louisiana jurisprudence which has declared that statute unconstitutional.

The Court would further, of course, like to point out that I believe that this is something that the Legislature clearly intended in view of the fact that the jurisdictional statute, that is 13:1570, clearly sets out that for certain enumerated offenses, if the juvenile is charged with a certain enumerated offense, that these cases shall be tried by the district court, and in those cases the juvenile would have the benefit of a jury trial because he would be tried by the district court as an adult. The Court believes that the Legislature clearly intended to make an exception in cases which are less serious than the crimes which are enumerated and clearly intended that a juvenile not be tried by a jury. Whether or not the Supreme Court or the Federal courts are going to declare that unconstitutional remains to be seen. But for now this Court believes that that is the law of this State. Accordingly the Motion for a Jury Trial is hereby dismissed.

APPENDIX NO. 3

Judgment of Court of Appeal; Re: Jury Trial

STATE OF LOUISIANA, IN THE INTEREST OF RUSSELL GIANGROSSO, LONNIE GROS, AND SCOTT HOOD — No. 11,979

In re: Russell Giangrosso, Lonnie Gros, and Scott Hood applying for writs of certiorari and mandamus.

ALTERNATE WRITS OF MANDAMUS, CERTIORARI AND PROHIBITION

The petition of the relators in the above entitled and numbered case having been duly considered,

IT IS HEREBY ORDERED that an Alternative Writ of Mandamus issue herein, commanding the Honorable A. J. Kling, Judge of the Parish Court for the Parish of Ascension (as Juvenile Court) to permit the taking of the depositions of the alleged victims and witnesses herein and grant the motion to have the alleged victims examined by a physician pursuant to R.S. 13:1579.1 and Articles 1429, et seq. and 1464 of the Code of Civil Procedure. In all other respects the writ is denied;

Or, in the alternative, said Judge and the respondent, Aubert D. Talbot, District Attorney for the Parish of Ascension, shall show cause in this Court, by briefs, on or before the 3rd day of June, 1978, why this writ should not be made peremptory; and

Should said Judge elect the alternative, IT IS ORDERED that a writ of certiorari issue herein, directing said Judge to transmit to the Court of Appeal, First Circuit, State of Louisiana, on or before the date aforesaid, the record, and a

certified copy of the record, of the proceedings complained of by the relators herein, to the end that the validity of the proceedings may be ascertained; and

IT IS FURTHER ORDERED, in the event the alternative is elected, that, in the meantime and until further orders of this Court, all proceedings against the relators in this cause in said Parish Court for the Parish of Ascension shall be stayed and suspended.

Granted at Baton Rouge, La., May 3, 1978.

s/ Frederick S. Ellis
s/ C. Lenton Sartain

APPENDIX NO. 4

Judgment of Supreme Court of La. Denying Writs

IN THE INTEREST OF RUSSELL GIANGROSSO, LONNIE GROS, AND SCOTT HOOD — NO. 62,393

In re: Russell Giangrosso, Lonnie Gros and Scott Hood applying for writ of certiorari (Parish of Ascension)

Writ Denied.

WFM
JWS
FWS
AT.JR.

DIXON, DENNIS, J. J., would grant the writ.

CERTIFICATE OF SERVICE

I, Benjamin C. Vega, Jr., the undersigned attorney, hereby certify that I have this day mailed three copies of the above and foregoing Petition for a Writ of Certiorari to the Honorable Aubert D. Talbot, District Attorney for the Parish of Ascension, by depositing the same in the United States Post Office, first class, postage prepaid, addressed to Mr. Talbot at his address: P. O. Box 97, Napoleonville, Louisiana, 70390; said service being made in accordance with U.S. Sup. Ct. Rule 33 (1), 28 USCA.

Donaldsonville, Louisiana, this 27th day of September, 1978.

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Donaldsonville, Louisiana 70346
Phone: 473-7911

IN THE
SUPREME COURT OF THE UNITED STATES

No. 78-544

RUSSEL GIANGROSSO, et al.,

Petitioners,

v.

THE STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF LOUISIANA

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 78-544

RUSSEL GIANGROSSO, et al.,

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v.

THE STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF LOUISIANA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI AND BRIEF
AMICUS CURIAE IN SUPPORT OF
PETITION FOR CERTIORARI

The State Public Defender of the State of California hereby respectfully moves for leave to file the attached brief amicus curiae in support of granting of certiorari herein. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondents was requested but refused.

The California State Public Defender is an agency of California state government which is charged with the representation on appeal of indigent criminal defendants, including minors whose cases are heard by juvenile courts.

The basic structure of the Juvenile Court Law of California resembles that of Louisiana in that there is no provision for the trial of any issue pending before it (which may include anything from the placement of a destitute child to the determination of a charge of premeditated murder) to a jury.

Should certiorari be granted, the outcome will have a direct effect on the cases of many thousands of California juveniles who face trial and punishment in such courts each year. We thus seek leave to file the attached brief amicus curiae in support of the granting of certiorari in order to demonstrate that the significance of the particular issues raised by counsel for petitioners herein transcends the state of Louisiana alone, and that they are of great importance to the administration of justice in many

other states, including California. Specifically, we seek to argue that like Louisiana, California has made significant changes in its laws regarding the treatment of juveniles charged with major felony offenses since this Court's decision in McKeiver v. Pennsylvania (1971) 403 U.S. 528; and that such changes, which openly authorize the punishment of juvenile offenders, directly undercut the premises upon which McKeiver was decided, i.e., that since punishment was not an ostensible goal of the juvenile court, a jury was not an essential component of accurate factfinding. Certiorari should therefore be granted in order to re examine and clarify the McKeiver decision.

Respectfully submitted,

QUIN DENVIR
State Public Defender
of California

EZRA HENDON
Chief Assistant
State Public Defender

LAURANCE S. SMITH
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IN THE
SUPREME COURT OF THE UNITED STATES

No. 78-544

RUSSEL GIANGROSSO, et al.,

Petitioners,

v.

THE STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF LOUISIANA

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE RIGHT TO TRIAL BY JURY MAY BE ARBITRARILY WITHELD FROM PERSONS FACING PUNISHMENT FOR ALLEGED CRIME MERELY BECAUSE THEY HAVE NOT ATTAINED A GIVEN CHRONOLOGICAL AGE

Counsel for petitioners has argued forcefully that Louisiana's response when a minor is accused of a serious criminal offense is substantially identical to its response when an adult is accused of similar conduct. It has been noted, for example, that the Louisiana Supreme Court has expressly recognized that both the nature of proceedings and the nature of consequences involved when a minor is accused of a serious offense are virtually indistinguishable from those visited upon an adult. (Pet. at 15, citing State In Interest of Dino (La. 1978) 359 So.2d 586, 596).

"A judicial proceeding which may result in the removal of a child from the custody of his parents and in his confinement until the age of twenty-one

years is not essentially different from a criminal trial. The purpose of the juvenile adjudicatory proceeding is to decide whether the accused is responsible for the prohibited conduct and, . . . the consequences may be in effect the same as in the case of an adult." (Ibid., 359 So.2d at 595.)

This candid recognition of the true nature of Louisiana juvenile proceedings is, of course, quite similar to this Court's unanimous recognition of the fact that a proceeding to determine whether a California juvenile was guilty of robbery was essentially criminal in that its consequences included both a deprivation of liberty and the imposition of moral stigma sufficient to warrant protection against double jeopardy. (Breed v. Jones (1975) 421 U.S. 519, 528, 529, 531.) "Under our decisions, we can find no persuasive distinction between [the instant] proceeding . . . and a criminal prosecution, each of which is designed to 'vindicate [the] very vital interest in enforcement of criminal laws'." (Ibid., 421 U.S. at 531; Cf. Gagnon v. Scarpelli (1973) 411 U.S. 778,

n. 12 at 789.)

A. Many States Have Abandoned Even Ostensible Adherence To The Idea That Allegations Of Serious Crime Should Be Dealt With In A "Protective Manner".

It is the purpose of this brief in support of the granting of a petition for certiorari to argue that there has indeed been a coalescence of public attitude around the proposition that where an adolescent is found guilty of a serious crime, the legal response should be punishment, i.e., confinement of the offender for the explicit purpose of quarantining him so as to protect the public. The idea that the public response to robbery, rape or murder by an adolescent should be limited to a mincing exhibition of concern for the offender's well-being has been well-nigh universally rejected by all segments of society. It follows directly from this state of affairs that this Court's holding in McKeiver v. Pennsylvania (1971) 403 U.S. 528, should be re-examined or clarified. It appears that the theoretical premises upon which

that decision rested, i.e., that the juvenile system existed to provide an "intimate, informal protective proceeding" (Ibid., 403 U.S. at 545) are no longer even ostensibly adhered to in many states, including Louisiana and including the nation's largest state, California. To leave McKeiver standing unclarified in the face of such changes would be to create the impression that invidious practices are being approved for the young simply because they are young; liable to adult-style punishment for their alleged wrongs, they are only entitled to fifth-rate "informal" factfinding procedures appropriate to such noncontroversial matters as the appointment of a guardian for an orphan.

This is something which we cannot assume the court intended by McKeiver; nevertheless, it is exactly how the decision is being read in many states.

For example, political leaders scanning the ideological spectrum all the way from Senator Edward M. Kennedy to President Gerald R. Ford have united in demands that "toughness" rather than

solicitude be shown serious juvenile offenders. (See, E. Kennedy, "Juvenile Crime: Justice Must Be Tougher", The Los Angeles Times, November 17, 1978, pt. II p. 7; "Ford Proposes Adult Punishment For Juveniles Who Commit Vicious Crimes", The Los Angeles Times, September 28, 1976, pt. I, p.5.) Joining the politicians has been a chorus of cries in local and national media for punitive crackdowns against youthful criminals. (See, e.g., Time magazine, July 11, 1977 (cover story) "Youth Crime"; J. Breslin, "Juvenile Justice: A Dark Victory (After Four Had Died, He Finally Lost The Ability To Terrorize New Yorkers)", The Los Angeles Times, July 27, 1977, pt. II, p.5.)

But what is most directly relevant is the fact that these expressions of public sentiment have been translated into legislation: changes in the express purposes of the juvenile court law to explicitly authorize the punishment of offenders. In 1975, for example, the California Legislature added[1/] the

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1. California Statutes 1975, Ch. 819.

following language to California Welfare and Institutions Code section 502 [now 202]:

"(b) The purpose of this chapter [i.e., the juvenile court law] is also to protect the public from the consequences of criminal activity, and to such purpose probation officers, peace officers, and juvenile courts shall take into account such protection of the public in their determinations under this chapter."

Another amendment to this code section[2] specified that a minor may be incarcerated "only when necessary for his welfare or for the safety and protection of the public". (Emphasis added.)

In California, a minor guilty of a serious offense is liable to be sentenced until age 23 [Calif. Welf. & Inst. Code § 1769(b)] to the California Youth Authority, a prison system for youthful offenders, wherein he will be housed with many adult persons convicted in regular

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2. California Statutes, 1976, Ch. 1071, § 4.

criminal courts[3] and where, most importantly, he will not even be under the direct care or supervision of the juvenile court. (In re Arthur N. (1976) 16 Cal.3d 226, 237-238; 545 P.2d 1345 .)

Recently, a California appellate court approved the commitment of a 13-year-old with no past record of imprisonment to the youth authority in reliance upon the legislative changes alluded to above, stating "This long overdue objective of juvenile justice [i.e., public protection] was correctly taken into account in deciding upon the commitment". (In re Gregory S. (1978) 85 Cal.App.3d 206, 213; _____ Cal.Rptr. _____ .)

The Youth Authority, of course, is statutorily enjoined to provide "training and treatment" (Calif. Welf. & Inst. Code § 1700), but so are California's notorious San Quentin and Folsom prisons.

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3. In addition to the mixing of young adults and juveniles within youth authority institutions, California statutes permit placement of youth authority inmates in various state prison facilities. (Cal. Pen. Code § 2035, 6126.)

(Cal. Pen. Code §§ 2022, 2032.)[4/] "Regardless of the purposes for which the incarceration is imposed, the fact remains that it is incarceration." (Breed v. Jones, supra, 421 U.S. n. 12 at 530.)

In view of the gravity of these consequences, both the California Legislature and Supreme Court have taken pains to point out that where an allegation of crime is disputed, there is to be no illusion of "informality" attached to the adjudicatory proceedings. (Calif. Welf. & Inst. Code § 680; Cal. Rules of Court, § 1313(c); People v. Superior Court (Carl W.) (1975) 15 Cal.3d 271, 275; 539 P.2d 807.) They are conducted "just like any other criminal . . . trial". (Ibid., 15 Cal.3d n.6 at 278; citing Thompson, California Juvenile Court Deskbook (1972) § 6.6.)

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4. California Penal Code section 2022: "The primary purpose of the California state prison at San Quentin shall be to provide confinement, industrial and other training, treatment, and care to persons confined therein."

B. Where The Community Demands Punishment For An Alleged Serious Crime, A Jury Is Essential To Accurate Fact-finding.

Where the purpose of a criminal proceeding is to adjudge a defendant to punishment and to uphold the community's right to protection from those guilty of crime, it is immaterial for purposes of the Sixth and Fourteenth Amendments whether the accused is above or below some arbitrary chronological age. It is material for the purposes of these amendments that where the public mood cries out for something other than the protective "coddling" of serious offenders, pressures to convict are brought to bear upon elected judges and other professional triers of fact which are as great or greater as those which led this Court to declare the right to trial by jury a fundamental right in Duncan

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v. Louisiana (1968) 391 U.S. 145.[5]

We can agree with this Court's reasoning in McKeiver v. Pennsylvania and the comparable (if a bit more floridly stated) reasoning of the California Supreme Court[6] that a jury might not be an essential component of accurate factfinding in

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5. Duncan, it should be recalled, involved a charge of simple battery against a 19-year-old youth which drew a sentence of 60 days and a $150.00 fine.

6. In re Daedler (1924) 194 Cal 320, 326; 228 Pac. 467 , a case involving murder, was the last California case to determine the right to trial by jury in other than dicta. It did so by applying the conclusions of an earlier case involving the placement of a destitute child in an orphanage. (Ex Parte Ah Peen (1876) 51 Cal 280.) It was easy in 1924 to equate a murder case with a guardianship proceeding in that there was then only one jurisdictional statute (former Calif. Welf. & Inst. Code § 700 [Cal. Stats. 1915, Ch. 631, § 700]) which contained 14 grounds of jurisdiction including being destitute, insane, truant, or frequenting pool halls. As the statutes cited in the text make clear, sharp distinctions have now been drawn between orphans and criminal offenders. (See Jury Trials for Juveniles, Rhetoric and Reality (1976) 8 Pac.L.J. 811.)

matters, such as the appointment of a guardian for an orphan, which are in fact benevolent, protective, and non-controversial in nature.

Even today, such reasoning might still be validly applied in some "criminal" juvenile proceedings -- a nine-year-old caught stealing bubble gum -- where the alleged offense is minor and there is in fact no thought of punishment. But where the court deals with an adolescent accused of a major felony such as rape, the consequences of conviction are as grave as sentence to the California Youth Authority, and where there is no meaningful appellate review[7], public demands for retribution and protection create a real possibility of conviction of the innocent which does make the jury an essential component of accurate factfinding; for all the reasons which have been so well elaborated since the

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7. See Donald & Dennis D. v. California, #78-817, Petition for Cert. filed November 14, 1978.

signing of the Magna Charta.[8/]

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8. One distinguished federal trial jurist has provided a contemporary elaboration of exactly how the jury does contribute to accurate factfinding:

"Sitting as a trial judge has reinforced my view that the greatest value of the jury is its ability to decide cases correctly. . . .

"A trial judge feels isolated when involved in his decision-making process. The kinds of group therapy and learning that takes place in jury deliberation are missing. He cannot talk with others. He may be uncomfortable, exposing tentative or incomplete thought processes to the lawyers. His clerk can help, but the relationship between the two makes it difficult for full value to be obtained from this exchange. . . . [Jurors] call to the attention of other jurors items of evidence that may have been forgotten or processes of decision making that have not been thought of by the others. . . . The result is more likely to be sound and correct." (Joiner, From the Bench, In Simon, The Jury System in America, 145, 146-147 (1976).)

CONCLUSION

Certiorari should be granted in this case to determine whether McKeiver v. Pennsylvania is to read as blanketly foreclosing enjoyment of the fundamental right of trial by jury to persons facing punishment for alleged serious criminal offenses merely because they have not attained a particular chronological age. Where there is no longer to be "an informal proceeding informed by sympathy and concern" which is "still attainable to outweigh the argument in favor of jury trials" (United States Ex Rel Murray v. Owens (2d Cir. 1972) 465 F.2d 289, 294, cert. den. 1972; 409 U.S. 1117) then that argument ought to prevail in the name of equal treatment; and above all in the name of accurate ascertainment of the truth or falsity of grave allegations of crime.

In sum, it is exactly as Mr. Justice White put it in his concurring opinion in McKeiver: "[The states] are also free if they extend criminal court safeguards to juvenile court adjudications, frankly to embrace condemnation

punishment and deterrence as . . . attributes of the juvenile justice system." (403 U.S. at 554; emphasis added.) The writ should be granted here so as to assure that minors facing charges in states which have embraced such goals receive something better than the worst of both worlds.

Respectfully submitted,

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Supreme Court of the State of Louisiana

OPPOSITION TO MOTION TO FILE BRIEF OF AMICUS CURIAE and BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO MOTION OF STATE PUBLIC DEFENDER OF CALIFORNIA TO FILE BRIEF AMICUS CURIAE

The State of Louisiana opposes the Motion of Quin Denvir, State Public Defender of California, for permission to file an *amicus curiae* brief in the above captioned case. The reasons for the opposition are as follows:

1. The proposed amicus brief relies on and incorporates by attachment, material which is not part of the record in this case. The attempt by the State Public Defender of California to prejudice the Court by bringing inadmissible (under Louisiana law) and unadmitted

material before this Court should receive short shrift. The proposed brief relies on this unadmitted material for much of its argument.

2. A cursory reading of the proposed *amicus* brief demonstrates that the *amicus* has no distinct interest beyond that of the parties in this litigation. The brief is no different from that which might have been submitted on behalf of the petitioners as party to this litigation. Request for *amicus* status through an attempt by the California Public Defenders to assimilate their position to the "petitioners" is a transparent call for multiple briefing on behalf of one party as a tactical advantage, rather than as a service to the Court in the tradition of true *amici curiae*.

Wherefore, the request by the State Public Defender of California for *amicus status* should be denied.

Respectfully submitted,

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BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

STATEMENT OF QUESTION PRESENTED

Whether a jury trial is among the essentials of due process and fair treatment required during juvenile adjudicatory proceedings.

STATEMENT OF THE CASE

On October 8, 1977, three white boys (minors) allegedly raped two white girls (minors) and attempted the rape of a third white girl (also a minor) on a levee in Point Houmas, Louisiana. No trial has been held as yet and the defendant minors are at liberty on bail, in the custody of their parents.

Petitioners sought to have a trial by jury. Inasmuch as the Judge of the Parish Court denied this motion, appeal was taken to and denied by the Court of Appeal, 1st Circuit, State of Louisiana. The Supreme Court of the State of Louisiana also denied applications for review of the defendants' motion for jury trial.

SUMMARY OF ARGUMENT

Louisiana Revised Statutes 13:1579 provides that all cases of children shall be heard separately from the trial of cases against adults and shall be tried without a jury. This statute does not present any conflict with Federal Constitutional Right or Jurisprudence. There is no denial of fundamental fairness or due process in such a statute.

ARGUMENT

I. Supreme Court of the United States Revised Rules, Rule 19 Precludes Review of State Law Not In Conflict with Federal Law or Posing a Federal Question.

II. There is no Federal Constitutional Requirement that Jury Trial be held in Juvenile Matter.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sect. 1257(3). However, this case does not, as is required by that Section, necessarily call for review of the constitutionality of the Louisiana Statute 13:1579. There is no Federal constitutional requirement that trials of juveniles be held with a jury. The State of Louisiana Statute is well within the accepted and usual course of judicial proceedings in regard to trial of juveniles. *McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L.Ed.2d 647, 91 S.Ct. 1976 (1971).

III. Trial of Juvenile Matters Before Experienced Judges Provide Fundamentally Fair Procedure.

IV. Fundamental Fairness does not Require Use of Jury As a Fact Finder.

As this Court's decisions in *Kent*, *Gault* and *Winship* make clear, a mere refusal to equate juvenile court proceedings with criminal prosecutions does not mean that youths charged with felonies are not guaranteed substantial constitutional protection. Rather, as each of this Court's decisions in the area has made clear, the

due process clause of the Fourteenth Amendment requires that juvenile court procedures must grant a youth a trial which, if it does not follow all of the forms of the criminal process, nevertheless is as fair and as accurate in its determinations as the criminal process. The latest formulation of this Court's attitude was stated in *McKeiver v. Pennsylvania, supra,* to the effect that: (1) the fact that the due process clause of the Fourteenth Amendment imposed the Sixth Amendment right to jury trial upon the states in certain "criminal prosecutions" did not automatically require jury trial in state juvenile delinquency proceedings, the claimed right to jury trial instead depending upon ascertaining the precise impact of the due process requirement on delinquency proceedings, (2) the applicable due process standard was fundamental fairness, and (3) notwithstanding the disappointments and failures with regard to state juvenile court procedure and its idealistic hopes relating to rehabilitation, nevertheless trial by jury in the juvenile court's adjudicative stage was not a constitutional requirement, particularly since requiring jury trial might remake the juvenile proceeding into a fully adversary process, with the attendant delay, formality, and clamor of such process, and would effectively end the juvenile system's idealistic prospect of an intimate, informal protective proceeding.

And if no system dispensing with trial by jury has been attempted in the United States with respect to criminal trials, it is equally clear that the vast majority

of states have constructed such systems in the juvenile realm. Recent review reveals twenty-seven American jurisdictions denied the right to trial by jury in juvenile cases whereas only twelve required it.[1] And since that time, Congress has removed the District of Columbia from the minority and added it to the majority with the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970, P. L. 91-358, 84 Stat. 473 (July 29, 1970). This Act replaced Section 16-2307 of the D.C. Code, which provided for trial by jury in juvenile cases with a new Section 16-2316, which specifically requires trial by the court alone. Typically, the pertinent Louisiana Statute (R.S. 13:1579) provides: "All cases of children shall be heard separately from the trial of cases against adults and shall be tried without a jury . . .". The judgment of twenty-eight legislative bodies, including the Congress of the United States, that fairness in juvenile proceedings does not require trial by jury deserves the respect of this Court.

Nor has a single appellate court anywhere in the United States held that the federal constitution requires the granting of jury trials at juvenile delinquency hearings under a statutory scheme in any way resembling that set forth by the Louisiana Statute.

Most States do not provide jury trial for juveniles. Even Illinois, New York and California, which have recently revised their juvenile court laws to increase

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1 The statutes are cited in Note, A Due Process Dilemma, Juries for Juveniles, 45 N.D.L. Rev. 251, 258, nn. 48-49 (1969).

procedural safeguards for the child, have not extended the right to trial by jury. In fact, of some fourteen jurisdictions in which appellate courts faced the question of the requirement of jury trial in juvenile cases, only the Supreme Court of New Mexico in *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968) has held that jury trials were required and the basis of the New Mexico decision was not the federal Constitution but provisions of the New Mexico Constitution and statutes totally inapplicable to this case.[2]

One of the most comprehensive opinions discussing the question is found in *In re Johnson*, 255 A.2d 419 (Md. 1969), wherein the Court of Appeals of Maryland discussed the entire question of the applicability of jury trials to juvenile cases. Although counsel for petitioner relied upon *Duncan*, see 255 A.2d at 421, the Court refused to apply the *Duncan* rationale to juvenile cases, noting that the *Gault* decision did not hold that all the criminal procedures labelled "due process rights" need be applied to juveniles. Rather the Court held, a juvenile is guaranteed only those rights required in

2 The only two federal cases which have even peripherally adverted to the right to jury trial in the light of *Gault* are of no help in solving the question. In *Nieves v. United States*, 280 F. Supp. 994 (S.D.N.Y. 1968), the court decided that such a right existed under the federal Juvenile Delinquency Act because that Act did not provide that juveniles were automatically free from criminal prosecution but, instead, normally gave the juvenile the choice between prosecution as an adult and adjudication as a juvenile. The result of the peculiar federal scheme, accordingly, was, the court held, to force the juvenile defendant to waive his right to jury trial in order to obtain other benefits. This scheme is, of course, unconstitutional. Compare *United States v. Jackson*, 390 U.S. 570 (1968).

criminal trials whose existence was necessary to provide for a fair hearing in juvenile courts. Moreover, the Court equated juvenile hearings with trials in equity wherein a jury has never been the finder of fact. Based on this reasoning and a study of the earlier decisions, the Court concluded unanimously that jury trial was not required in juvenile cases.

Similarly, the Supreme Court of Ohio in *In re Agler*, 19 Ohio St. 2d 70, 249 N.E.2d 808 (1969), refused to require jury trial in juvenile cases, again looking to equity jurisdiction as the touchstone by which the fairness of trials without juries should be judged. The Court held (249 N.E.2d at 814):

> "Furthermore, we can percieve no benefit worthy of destroying a juvenile's traditional entitlement to special status which might accrue to an alleged delinquent from a jury trial. Unquestionably, fair adjudication can be had for a child represented by counsel, from a judge applying proper rules of evidence and a proper standard of proof. There exists a right of appeal to remedy error and reviewing courts may exercise vigilance over arbitrary determinations of delinquency."

Moreover, the Court declined to require indictment in delinquency proceedings, appropriately declining "to label delinquency a capital or otherwise infamous crime" which would require indictment or jury trial. Just as the Court in *Gault* had criticized labeling delinquency proceedings "civil" and thereby avoiding all need to provide constitutional protections, the Court in

Agler noted that no purpose was served by simply treating juvenile proceedings as "criminal." In fact, the whole purpose of the juvenile proceeding was to avoid many of the attributes of criminal trial.

Yet again, the Supreme Court of Oregon in *State v. Turner*, 88 Ore. Adv. Sh. 363, 453 P.2d 910 (1969), refused to apply *Duncan* to juvenile cases (453 P.2d at 913-14):

> "Regardless of the veneration in which Anglo-American law rightly holds the jury as an instrument of criminal justice, it must be remembered that crime and punishment are not the primary business of the juvenile court. There is reason to question whether a jury trial is the most trustworthy instrumentality for protecting the rights of the child, his parents, and the state in a proceeding intended to salvage a child, if he is in need of governmental control.
>
> One of the principal reasons for retaining trial by jury in the administration of criminal justice has been the desire of American society to mitigate the letter of the criminal law. When the question is 'guilt' or 'innocence,' the people feel more secure in their confrontations with the government when a jury is present. The jury brings to its work in a criminal case a combination of sentiment and common sense. Frequently, the jury views the state with healthy skepticism, and

> tempers justice with subjective values for which no provision had been made in any statute. As Mr. Justice Holmes observed in Horning v. District of Columbia, 254 U.S. 135, 138, 41 S.Ct. 53, 54, 65 L.Ed. 185 (1920), '* * * the jury has the power to bring in a verdict in the teeth of both law and facts.' The ad hoc legislative contribution of the jury system to the criminal law might enhance an occasional case involving the wardship of a child. But it is not certain that broad generalizations equating adult and juvenile cases are justified. If a fact-finding process before the judge is conducted in a fair and trustworthy manner without a jury, it is arguable whether the clash and clamor of a jury trial would enhance the rehabilitation of a child. See e.g., discussion in Dryden v. Commonwealth, supra, and In re Estes, supra.
>
> We recognize the distinction between the adjudicative phase of a juvenile case and the dispositional phase. We are also aware that it is possible to utilize the jury in the first phase and to exclude it from the second. There is reason to believe, however, that, at least in cases of first offenders and of other children who have not yet embarked upon a criminal career, the adjudicative phase of their court experience presents an important rehabilitative opportunity. See Note, Rights and Rehabilitation in the Juvenile Courts, 67

Colum.L.Rev. 281, 283, 289, 321, 325 (1967) (internal evidence indicates, however, that this article was written before the Court published its decision in *Gault*).

The imponderable question, of course, is whether there is any substantial danger that a child brought before a court without a jury would be found 'in need of wardship' when in fact he had not committed the act charged. The concomitant question is whether the presence of the jury in the case would contribute a sufficiently substantial reduction in the margin of error to outweigh the possible harm to the child from participation in the drama of a criminal trial.

During the evolution of separate courts for juveniles the nation's legislative bodies considered all the arguments for and against jury trials in such cases. The possible danger of 'convicting the innocent' undoubtedly weighed heavily in legislative deliberations. Unfortunately, however, no objective data have been found to answer the question whether such a danger exists. A dozen of the states and the District of Columbia have elected to provide jury trials for children. See Note, A Due Process Dilemma — Juries for Juveniles, 45 N. Dak. L. Rev. 251, 258 (1969). The majority of the states have decided that jury trials in juvenile cases would do more harm than

good. While virtually all these legislative decision antedated *Gault*, the legislators must have believed that the danger of a miscarriage of justice in the absence of a jury was remote."

THIS SAME ANALYSIS IS EQUALLY APPLICABLE TO THE LOUISIANA STATUTE.

V. The Most Careful Commentators have Concluded that Trial by Jury would Detract, Rather than Add to the Fairness of Juvenile Proceedings.

In the Task Force Report: "Juvenile Delinquency and Youth Crime", p. 38, The President's Commission on Law Enforcement and Administration of Justice enlarged upon the report set forth in "The Challenge of Crime in a Free Society", and stated as to jury trials:

> Most States do not provide jury trial for juveniles. Even Illinois, New York, and California, which have recently revised their juvenile court laws to increase procedural safeguards for the child, have not extended the right to trial by jury. There is much to support the implicit judgment by these States that trial by jury is not crucial to a system of juvenile justice. As this report has suggested, the standard should be what elements of procedural protection are essential for achieving justice for the child without unduly impairing the juvenile court's distinctive values.

As has been observed, "A jury trial would inevitably bring a good deal more formality to the juvenile court without giving the youngster a demonstrably better fact-finding process than trial before a judge." The presence of a jury tends in a number of ways to contribute to an atmosphere of formality. In part, formality becomes itself an end insofar as it helps instill in jurors a sense of the seriousness and solemnity of their duties. Moreover, the presence of a jury affects the whole process dealing with evidence. Much of the reason for many restrictive rules of evidence, which typically give rise to narrow contentiousness over marginal issues, stems from the felt need to protect against a jury's susceptability to prejudice and irrelevancies and its limited ability to distinguish between the more and less probative. And when a jury is the object of an attorney's persuasion, he naturally responds to what he believes will most affect it, with the usual result an emphasis on staging, effect, and emotion rather than a more businesslike presentation.

A further consideration arguing against a jury arises out of the typically loose and general statutory formulations of the behavior that may subject a youth to juvenile court jurisdiction, particularly insofar as the conduct includes acts other than those that

would be criminal if engaged in by adults: *i.e.*, incorrigibility, need for care and supervision, truancy. Inequality and disparate decisions are invited by giving these formulae to *ad hoc* juries for application rather than to judges, who tend inevitably to develop concrete meanings for such terms. If a jury were required, the appropriate standard of proof (beyond a reasonable doubt, preponderance of the evidence, and so forth) would become a more critical issue.

As Mr. Justice Cardozo noted, it would not appear that a fair and enlightened system of justice is impossible without jury trials. "This too might be lost, and justice still be done."

CONCLUSION

For the foregoing reasons, it is respectfully requested that the order of the court below be affirmed and the petitioners' application for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Abbott J. Reeves, the undersigned attorney, hereby certify that I have this day mailed three copies of the above and foregoing Brief in Opposition to a Petition for a Writ of Certiorari to Benjamin C. Vega, Jr., Esq., P. O. Box 775, Donaldsonville, Louisiana 70346 and to Alan J. Robert, Esq., 116 East Railroad Avenue, Gonzales, Louisiana 70737, attorneys for petitioners, by placing same in United States Post Office, first class, postage prepaid, said service being made in compliance with United States Supreme Court Rule 33(1).

Gretna, Louisiana.
This ____ day of
_____, 1979

Abbott J. Reeves